STATE OF MICHIGAN

COURT OF APPEALS

GARY A. MILLER,

Plaintiff-Appellee,

v

LAKE STATES INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 27, 1999

No. 199486
Ogemaw Circuit Court
LC No. 92-001893 CK

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals as of right a trial court order denying its motion for a new trial on the basis of newly discovered evidence, MCR 2.612(C)(1)(b). We reverse and remand for a new trial.

Plaintiff filed a breach of contract action against defendant after defendant denied plaintiff's fire insurance claim on his pizzeria business because the fire resulted from arson and defendant claimed that plaintiff had started the fire. At trial, defendant offered evidence that showed that the fire was intentionally set, that a witness saw a person that the witness believed was plaintiff at his business the night of the fire and that plaintiff's business was in poor financial condition. However, the jury did not accept defendant's allegation that plaintiff was the arsonist and it rendered a verdict for plaintiff equaling $161,675 in damages.

Subsequently, defendant discovered new evidence regarding the fire: An alleged co-conspirator of plaintiff, Vernon Roach, confessed that plaintiff offered to pay him $1,500 for setting fire to plaintiff's pizzeria business, payable when plaintiff recovered on his insurance. Roach stated that he set the fire with some friends, but had not yet been paid. Defendant appealed to this Court. Shortly thereafter, plaintiff was criminally charged with arson, burning insured property and false pretenses over $100, stemming from Roach's confession. Roach testified at plaintiff's preliminary examination and plaintiff was bound over for trial. This Court remanded defendant's civil case to the trial court to hear its motion for relief from judgment,[1] which the trial court denied. Defendant again appealed to this Court, which remanded a second time for the trial court to reconsider defendant's motion for a new trial. Before the trial court could reconsider defendant's motion, the criminal charges against plaintiff were dropped for

unknown reasons, although Roach and one other person pleaded guilty to lesser offenses to the original arson charges. After the motion hearing, the trial court denied defendant's motion upon finding that the evidence was cumulative to the "general effort to lay culpability at the doorstep of plaintiff," and that a different result was not probable because defendant's new theory would be contradictory to the original theory presented.

Defendant argues that the trial court improperly denied its motion for a new trial based on the newly discovered evidence that plaintiff conspired to burn his business. A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). A trial court may grant relief from judgment on the grounds of "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)." MCR 2.612(C)(1)(b). To merit a new trial, the moving party must show that the evidence itself, not merely its materiality, (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994); *Nickel v Nickel*, 29 Mich App 25, 31; 185 NW2d 200 (1970). Accordingly, we must look to the trial court's findings on each of these factors to determine whether it abused its discretion by denying defendant's motion for a new trial.

First, the trial court properly found that the evidence of Roach's confession was newly discovered and could not have been discovered with reasonable diligence in time for trial. The evidence was not discovered by the police investigating the arson until after the trial in the instant case and Roach did not testify until plaintiff's preliminary examination, which took place more than four months after the civil trial ended. The trial court was satisfied that defendant had made a "thorough investigation" and that the new evidence was not and could not have been known to defendant at the time of the civil trial. Consequently, we find no basis to dispute the trial court's findings as to factors (1) and (4).

Second, the trial court properly found that the new evidence was not cumulative to evidence presented at trial, although it then determined that the evidence was cumulative to the "general effort to lay culpability at the doorstep of plaintiff." At trial, defendant offered evidence showing that the fire was intentionally set, that a witness saw a person that he believed to be plaintiff at his business the night of the fire and that plaintiff's business was in poor financial condition. In contrast, Roach testified at the preliminary examination that plaintiff offered him money to burn down the restaurant and that he did so. There was no evidence introduced at trial that attempted to prove that plaintiff hired someone *else* to burn his business. Although the trial court found that the evidence was cumulative in the sense that both the trial evidence and the new evidence "laid the blame" for the arson on plaintiff, this finding is not relevant to the legal test at issue. The plain language of this standard states that the defendant must show that "the evidence . . . is not merely cumulative," *Mechura, supra* at 483, not that the overall theory of the case is not cumulative. Indeed, this Court granted a new trial in *Mechura* on the basis of evidence that supported the defendant's previous general theory of self-defense, but altered the specific theory of what happened to include the new evidence that the victim was in possession of a gun at the time of the incident. Thus, in our judgment, since the new evidence is not merely cumulative to evidence

introduced at trial, it is not cumulative under the legal standard set forth in *Mechura*. Therefore, factor (2) has been established by the defendant.

Third, the trial court found that "a different result was not probable for the principal reason that defendant's present case will be absolutely contradictory to the first case." In connection with this determination, the trial court also stated that "there was strong evidence by eyewitness testimony, that at the time and place of fire that the plaintiff was at his place of business" and that "[t]he Court finds the defendant to be inaccurate in its memory of this proceeding to the extent that defendant asserts a merely circumstantial case of arson was presented to the trier of fact." However, although a theory of arson was strongly presented at trial, the identity of the arsonist was merely circumstantial. The neighbor that placed plaintiff at his place of business only testified that he saw plaintiff's truck, and a shadow of a person who walked like plaintiff across a street and enter a fiberglass door. He apparently assumed that the person he saw was plaintiff. Even if the neighbor could clearly identify plaintiff, he further testified that he could not remember exactly what time it was, but mentioned times between 1:30 a.m. and 3:30 a.m. Plaintiff admitted that he was at the pizzeria business at around 12:30 a.m. Therefore, there was not strong, direct evidence placing plaintiff at the scene of the crime at the time the fire started or explicitly identifying him as the arsonist. Since defendant's first theory was based on circumstantial evidence, with the weakest link being the identity of the perpetrator, the new evidence is not necessarily contradictory. Instead, in our judgment, it serves to explain some of the holes in the arson theory that the first jury evidently found so problematic. Even if some portions of the new evidence were to contradict the original trial argument, "a party may state as many separate claims or defenses as the party has, regardless of consistency," MRE 2.111(A)(2)(b). Any logical inconsistencies in defendant's argument will be subject to evaluation by the factfinder in a second trial, but at the same time, the factfinder will be informed that the reason for any inconsistencies is the availability of new evidence. In this circumstance, the chance that defendant will get a different result in a second trial is reasonably high, regardless of any minor discrepancies.

More importantly, however, whether the new evidence would be contradictory to that introduced in the first trial is not the correct standard to apply in determining the merits of a new trial. Instead, the correct test is whether Roach's confession would "probably" result in a different jury conclusion at a new trial. Contradiction between the evidence adduced in the first and second trials is, at most, merely a factor to consider in applying the correct standard; it is not the exclusive test. Thus, we conclude that the trial court erred by applying the wrong standard as to factor (3). Under the correct standard, the trial court should have noted that Roach's account of the arson certainly would have provided corroboration of defendant's theory of plaintiff's culpability in the arson, and would have filled in the weak link in defendant's chain of circumstantial evidence regarding the arson-- the perpetrator. In addition, although the trial court cited the lack of criminal prosecution, apparently as a reason that a new jury would not come to a different conclusion, a civil trial court is not bound by the judgment of a criminal jury or prosecutor. The fact that plaintiff's criminal charges were dismissed by the prosecutor is also not dispositive on this issue. Obviously, there are a number of prudential reasons, unrelated to the merits of a new civil trial, why a prosecutor might choose not to proceed with a case. Indeed, even if the substantive quality or quantity of evidence against plaintiff *was* a factor in the prosecutor's decision, a prosecutor must prove a defendant guilty beyond a reasonable doubt at trial.

A civil party only needs to prove that plaintiff was responsible for criminal conduct by a preponderance of the evidence. There is considerable precedent for a defendant to be found not guilty in a criminal trial, but nevertheless liable or responsible in a civil proceeding. Absent further evidence concerning the prosecutor's basis for not pursuing a criminal prosecution in this case, we do not find this circumstance to be sufficiently important that it should play a role in the determination of whether a different result is "probable" upon a retrial of a civil dispute.

Defendant previously produced evidence regarding plaintiff's motive to burn his business and the fact that the fire was arson. The principal piece of the puzzle that was missing at trial was a firm identification of the perpetrator and plaintiff's precise role in the arson. With the newly discovered evidence of Roach's confession, this seems, at least arguably, to be explained. Although the outcome of any jury verdict is uncertain beforehand, we cannot say that the newly discovered evidence is either cumulative or that it "probably" would not have resulted in a different verdict. In our judgment,[2] the trial court applied the wrong legal analysis in finding to the contrary on factors (2) and (3). Thus, we find that the court abused its discretion by denying defendant's motion for a new trial. In other words, we are not engaging in a de novo review or a "rehearing" of the facts of this case, as the dissent suggests. Analysis of the facts of this case under the correct test for a new trial based on newly discovered evidence clearly shows that there is no justification or excuse for a ruling that a different result upon retrial would not be probable. The purpose of the strict test for a motion for new trial is to make sure that parties use "care, diligence, and vigilance in securing and presenting evidence" at their initial trial. *Murchie*, *supra* at 561. Here, defendant did so, and it should be allowed the opportunity to present this new evidence to a jury, especially because "it is untenable on public policy grounds to allow a person to profit from such a fraud." *Lichon v American Universal Ins Co*, 435 Mich 408, 413; 459 NW2d 188 (1990). "A person who owns insured property and causes it to burn is not entitled to collect the insurance proceeds." *Id*.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] Although defendant's motion sought relief from judgment, the court's order stated that it was denying a motion for a new trial.

[2] The use of the phrase "In our judgment" reflects merely the *application* of a standard by this Court, not the substantive standard itself, as the dissent suggests. Clearly, this Court must "judge" whether the trial court applied the correct standard in this case, and here, we find that it did not.